

# **BEFORE THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD**

<b>IN THE MATTER OF THE COMPLAINT FILED )</b>	<b>FINDINGS OF FACT AND</b>
<b>BY THE CITY OF BRANDON, BRANDON, )</b>	<b>CONCLUSIONS OF LAW;</b>
<b>SOUTH DAKOTA, AGAINST JEREMY )</b>	<b>NOTICE OF ENTRY OF</b>
<b>SCADDEN CONSTRUCTION, VALLEY )</b>	<b>ORDER</b>
<b>SPRINGS, SOUTH DAKOTA )</b>	<b>OC06-007 FoF</b>

On October 2, 2006, pursuant to SDCL 49-7A-17, the South Dakota One Call Board (Board) received a complaint filed by the City of Brandon, Brandon, South Dakota (Brandon), against Jeremy Scadden Construction, Valley Springs, South Dakota (Scadden). According to the complaint, Scadden failed to call South Dakota One Call for a locate ticket prior to excavation for a basement began at 101 Country Club Avenue, Brandon, SD 57005, in violation of SDCL 49-7A-5.

Pursuant to SDCL 49-7A-23 and 49-7A-24, a copy of the complaint was forwarded to Scadden by U.S. mail on October 6, 2006, advising him that he must file an answer in writing by October 27, 2006. Scadden filed an answer to the complaint on November 2, 2006. Pursuant to SDCL 49-7A-22, a five member panel (Panel) was appointed by Jerry Schroeder, Chairman of the Board, for the purpose of determining whether there was probable cause to believe there had been a violation of any statute or rule of the Board. The Panel met on November 3, 2006. Pursuant to SDCL 49-7A-25, based on the complaint filed by Brandon, the Panel determined by unanimous vote that there had been violations of the statute as alleged in the complaint.

Pursuant to SDCL 49-7A-27, a copy of the Panel's recommendations was sent to the parties. The Board did not receive an acceptance or rejection of the Panel's recommendations from either Brandon or Scadden.

A hearing was held as scheduled on May 4, 2007, at 9:00 a.m., in the International East Conference Room, Holiday Inn City Centre, 100 West 8<sup>th</sup> Street, Sioux Falls, SD. This hearing was conducted along with OC06-008, 009 and 010. The City of Brandon was present and represented by counsel. Scadden was present and also represented by counsel. Brandon presented evidence through the testimony of Wayne Fletcher, Jimmie Fjerstad, and Rollie Hoeke. Scadden presented evidence through his own testimony. The issue at the hearing was whether Scadden failed to notify the one-call center before excavating in violation of SDCL 49-7A-5.

At the conclusion of the hearing, a motion was made by Kurt Pfeifle, a Board member present at the hearing. Mr. Pfeifle moved that based on the testimony and the evidence submitted Scadden did violate SDCL 49-7A-5 by commencing excavation at 101 Country Club Avenue, Brandon, South Dakota, without providing advance notification to the South Dakota One Call System as required by statute. Kevin Kouba, Board Member, provided a second to the motion. Chairman Jerry Schroeder called for discussion on the motion. There was no discussion and a vote was taken of all the members present. There was a unanimous vote by all the members of the Board present at the hearing in support of the motion. Those members present at the hearing for the vote included: Jerry Schroeder, Todd Chambers, Kevin Kouba, Bleau LaFave, Eugene Solseth, Doug Larson, Rod Cundy and Kurt Pfeifle.

Having considered the evidence of record and applicable law, the Board makes the following Findings of Fact, Conclusions of Law and Order.

## **FINDINGS OF FACT**

1. On October 2, 2006, pursuant to SDCL 49-7A-17, the South Dakota One Call Board received a complaint filed by the City of Brandon, Brandon, South Dakota, against

Scadden, Valley Springs, South Dakota. According to the complaint, Scadden dug a basement without first notifying the South Dakota One Call System. The complaint alleged Scadden failed to notify the one-call center before excavating in violation of SDCL 49-7A-5.

2. Brandon presented evidence and exhibits to the Board through the testimony of Wayne Fletcher, the Director of Public Works for Brandon, Jimmie Fjerstad, the One Call locator for the City of Brandon, and Rollie Hoeke, the Public Works Supervisor for the City of Brandon. Scadden presented evidence and exhibits to the Board through his own testimony.
3. Mr. Fletcher received notice there was excavation at 101 Country Club Avenue, despite lack of a utilities locate request. Upon further inspection and a visit to the alleged excavation site, Mr. Fletcher confirmed SD One Call was not notified and indeed excavation had begun. In addition, Scadden's excavation equipment was located at the excavation site. Transcript page 10.
4. Scadden admits he excavated at 101 Country Club Avenue and further admits he did not call South Dakota One Call. He did not call however, because the general contractor, working at 101 Country Club Avenue instructed Scadden to begin the excavation process. Further the general contractor assured Scadden that South Dakota One Call had been contacted and utilities had been located. Id. at page 83 and 84.
5. Mr. Fjerstad, the One Call locator for Brandon, received a One Call locate request for 109 Country Club Avenue. He discovered upon arriving at 109 Country Club Avenue, that the ticket had been incorrectly called in. The intended address for the utilities locate was 101 Country Club Avenue, the excavation site subject to this Complaint. He proceeded to mark 109 Country Club Avenue, and later visited Scadden at 101 Country Club Avenue. Id. at 18 and 19.
6. Mr. Fjerstad informed Scadden of the mistaken address on the utilities locate request. Mr. Fjerstad further suggested Scadden call in a new ticket with the correct address. Id. at 19
7. One Call records indicate neither Scadden nor the general contractor attempted to call in an additional utilities locate request with the correct address at 101 Country Club Avenue.
8. The Board finds testimony credible and further finds that sufficient evidence exists to indicate Scadden did not properly provide prior notification to the One Call System prior to excavation at 101 Country Club Avenue, in violation of SDCL 49-7A-5.

#### **CONCLUSIONS OF LAW**

1. The Board finds that it has jurisdiction over this matter pursuant to SDCL Chapter 49-7A, including 49-7A-2, 49-7A-4, 49-7A-5, 49-7A-8, 49-7A-10, 49-7A-12, 49-7A-17 through 49-7A-27, inclusive, and SDCL Chapter 1-26.

2. SDCL 49-7A-5 provides in part that, "No excavator may begin any excavation without first notifying the one-call notification center of the proposed excavation..."
3. The Board finds that there is sufficient evidence to find that Scadden violated SDCL 49-7A-5 by failing to provide notice to the one-call notification center prior to excavating at 101 Country Club Avenue, Brandon, SD.
4. The Board assess a penalty of one thousand dollars (\$1,000) with nine hundred dollars (\$900) suspended on the following conditions: (i) Scadden fully complies with SDCL 49-7A-5 and ARSD 20:25 for twenty-four months; and (ii) Scadden fully complies with the resolution of Complaint OC06-007 by making payment of the one hundred dollars (\$100) within thirty (30) days of the issuance of these Findings of Fact, Conclusions of Law and Final Order.

It is therefore

ORDERED, that the Board finds that Jeremy Scadden Construction did violate SDCL 49-7A-5; and it is

FURTHER ORDERED, that Jerry Scadden Construction fully comply with the Enforcement Committee's Findings of Fact and Conclusions of Law and penalty recommendations.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 13<sup>th</sup> day of June, 2007. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Sioux Falls, South Dakota, this 13<sup>th</sup> day of June, 2007.

<p style="text-align: center;"><b>CERTIFICATE OF SERVICE</b></p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p>By: <u>[Signature]</u></p> <p>Date: <u>6/13/07</u></p> <p style="text-align: center;">(OFFICIAL SEAL)</p>
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BY ORDER OF THE SOUTH DAKOTA ONE-CALL BOARD:

[Signature]  
JERRY SCHROEDER, Chairman

[Signature]  
Under the Authority and on behalf of the Chairman

LARRY ENGLERTH, Executive Director